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Gone and Forgotten: Vinogradoff's Historical Jurisprudence

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ABSTRACT

Sir Paul Vinogradoff was once well-known for his historically contextualised approach to legal theory which held that legal ideas were the contingent products of social factors. Law was necessarily engaged with other subjects, and 'historical jurisprudence' could produce real insight into the nature of law - in part by placing theories such as analytical jurisprudence in context, evaluating and modifying theoretical models by reference to the contingent social facts of an era. This was part of the nineteenth century turn to 'science' in history and a focus on methodology. Sir Henry Maine argued that legal history proved the insufficiency of analytic theories, but his method met with many criticisms, some of which Vinogradoff sought to address. However, Vinogradoff's insights have rarely been pursued or developed, with legal history favouring Maitland's more doctrinal approach, and legal theory rejecting historical jurisprudence – at least explicitly. Despite its imperfections, historical jurisprudence offers a rich and valuable way to understand law, including to evaluate analytical models such of those of H L A Hart, and as a methodology for dialogue between comparative and historical legal scholarship. It has, in fact, continued to do so without explicit recognition in the 100 years since Vinogradoff's death.

INTRODUCTION

> *Just because the lawyer has to keep to distinct rules, he will often be behind his age and sometimes in advance of it. His doctrine, once established, is slow to follow the fluctuations of husbandry and politics: while in both departments new facts are ever cropping up and gathering strength, which have to fight their way against the rigidity of jurisprudence before they are accepted by it…On the other hand, notions of old standing and tenacious tradition cannot be put away at once, so soon as some new departure has been taken by jurists; and even when they die out at common law such notions persist in local habits and practical life.*
>
> - Sir Paul Vinogradoff[1]

It is not difficult to find recent examples of scholarly work calling for a fresh consideration of how we use (or do not use) history in thinking about law. For example, Markus Dubber calls for a revival of historical analysis of law as a mode of legal scholarship which can ground and reveal critical norms, and contextualise them.[2] Multiple Anglo-American essay collections and conferences in recent years have discussed the serious problem of how, if history is required in order to have a richer, more rounded discourse about law, we are going to use that history in our legal thinking.[3] Brian Tamanaha even argues that we have been doing it all along, surreptitiously and without acknowledgement.[4] In the context of this increased interest in 'historicism' or 'historical jurisprudence', the obvious question arises – what does it actually mean to use history in this way? Contextualised legal thinking of any kind arguably offers richer, *thicker*,[5] ways of

[1] P Vinogradoff, *Villainage in England* (Oxford: Clarendon, 1892) p 212.
[2] M Dubber, 'New Historical Jurisprudence: Legal History as Critical Analysis of Law' (2015) 2(1) Critical Analysis of Law 1.
[3] For example, M Del Mar and M Lobban (eds) *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart 2016). See also A Musson and C Stebbings, *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012); a special edition of the Virginia Law Review entitled *Jurisprudence and (its) History* (2015) 101(4) Virginia Law Review; and M D Dubber and S Stern (eds) *Special Issue, New Historical Jurisprudence & Historical Analysis of Law*, 2:1 Critical Analysis of Law (Toronto, 2015).
[4] B Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56(6) William and Mary Law Review 2235, p 2237.
[5] For a recent discussion of the importance of methodology and the role of 'thickness' in thinking about law, see E Fisher, 'Through 'Thick' and 'Thin': Comparison in Administrative Law and Regulatory Studies Scholarship' in P Cane, H C Hoffman, E C Ip and P L Lindseth (eds) *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press, forthcoming). See also on 'thickness' J Getzler, 'Brian Simpson's

understanding law, but it does not mean that all lawyers must become professional sociologists, anthropologists - or historians. What it does mean is consciously asking ourselves *how* we go about the rigorous academic study of law, and in answering that question recognising that there are a multitude of answers, most of them useful in some way, and none of them perfect.

Modern models for contextualisation can be found, for instance, Critical Legal History as coined by Bob Gordon,[6] and in Tamanaha's 'realistic socio-legal theory',[7] and a number of scholars in the last twenty years or so have generally urged that there we should be asking more of jurisprudence than legal philosophy.[8] To modern lawyers, that 'jurisprudence' might primarily suggest legal positivism and natural law theory – the first especially dominates 'legal philosophy'. But even if the many modern alternative schools of thought including CLS are set aside, we have collectively begun to remember that 'a third major pillar of jurisprudence…has existed for several centuries as a rival'.[9] Whilst this 'third pillar' is out of favour, Tamanaha argues that several of its core propositions are now 'virtually taken for granted – a remarkable achievement for a theoretical perspective on law that remains all but invisible,' even in modern positivist accounts which acknowledge the social nature of law.[10] These principles also survive in various other disciplines, including what is now called sociology, for example through the works of Ehrlich, whose idea that

Empiricism' (2012) 3(2) Transnational Legal Theory 127, 137-9. Simpson's methodology had much in common with Vinogradoff's, although Simpson himself was somewhat dismissive of his philosophy: see below n 179

[6] R W Gordon, 'Historicism in Legal Scholarship' (1981) 90(5) Yale Law Journal 1017; R W Gordon, 'The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument' repr in idem, *Taming the Past* (CUP 2017) 282; idem, 'The Arrival of Critical Historicism' (1997) 49 Stanford Law Review 1023. See further section 1 below.

[7] B Tamanaha, *Realistic socio-legal theory: Pragmatism and a social theory of law* (Oxford University Press, 1997).

[8] From the back catalogue of Legal Studies itself, A C Hutchinson, : 'Casaubon's Ghosts: The Haunting of Legal Scholarship' (2001) 21 Legal Studies 65 calls for 'ghost-busting' 'useful jurisprudence' which ceases to claim universal, objective validity and instead embraces the richness and contingency of law, historical and otherwise. Ceri Warnock does something similar in a more immediately practical context when she calls for a less impoverished discourse about dynamic forms of adjudication in environmental courts and tribunals: 'Reconceptualising specialist environment courts and tribunals' (2017) 37(3) Legal Studies 391.

[9] Maine's historical jurisprudence and Vinogradoff's were both compatible with analytical jurisprudence, but they have not been used as such: R Cosgrove, 'Sir Henry Maine: Historical Jurisprudence and Social Reform' in idem, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (NYU 1996), p 119; p 144.

[10] Tamanaha, 'Third Pillar', above n 4, p 2237.

law interacted with social forces as 'living law' was influenced by Montesquieu, Savigny,[11] and Roscoe Pound.[12]

The outcome of this forgetfulness is that in jurisprudence, although less so in sociology, Savigny and Maine's claims that law evolves in connection with society are taken for granted, without recognition of their provenance.[13] Law is understood in social terms, but without any recognised jurisprudential tradition to match the idea,[14] limiting our ability to fully understand and engage with what that means. Lacey thinks this gives historical jurisprudence ongoing interest:

> Whatever the weaknesses of that broad (and itself diverse) nineteenth and early twentieth-century tradition in the history of legal theory, there is strong reason to think that something important was lost with its decisive and lasting marginalisation at the hands of an analytical jurisprudence which has no use for either its own or law's genealogy.[15]

If we seek to reverse the marginalisation and discuss 'historical jurisprudence', the response - if there is one - is usually to think of Sir Henry Maine and his infamous claim that the history of property law was the history of 'progress' from 'status to contract'. The name of Sir Paul Vinogradoff may not even get a mention. But it was Vinogradoff who took up the baton where Maine had left it – not far out of the starting blocks – and turned historical jurisprudence into a viable method for asking about the nature of law. The value of what he did, and its ongoing potential, can be demonstrated through a brief consideration of a topic both he and Maine spent a great deal of time on: legal custom.

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[11] ibid, p 2252, citing E Ehrlich, 'Montesquieu and Sociological Jurisprudence' (1916) 29 Harvard Law Rev 582; idem, *Fundamental Principles of the Sociology Of Law* (Walter Moll trans, 1936).
[12] R Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 24 Harvard Law Review 591.
[13] Tamanaha, above n 3, p 2261; In general, Gordon, 'Historicism', above n 6, p 1029; idem, 'Past as Authority', above n 6, p 287.
[14] D Elliot, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 Columbia Law Review p 38; R Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge University Press, 1988), p 213-215.
[15] N Lacey, 'Jurisprudence, History, and the Institutional Quality of Law' (2015) 101(4) Virginia Law Review 919, p 920.

Throughout its history, the English legal system has been plural in different ways, and when confronted with a multiplicity of courts, with varied procedures, practices and conceptions of law, the Hartian legal positivist model descended from Austin is of limited use, and cannot identify rules governing the political community as a whole.[16] In the context of medieval Europe, the area on which Vinogradoff worked most, it was clear that a number of conceptions of law coexisted at the same time, interacted, and influenced each other's development. The transformation from custom to officialised law had to be investigated and explained, along with the creation of technical rules facilitating the development of abstract ideas within the legal system instead of relying on regulatory custom.[17] And yet, beyond Maine's disparagement of analytical approaches in the nineteenth century, modern legal theory has done little to engage with this sort of contextual muddle. David Ibbetson is in a minority in having actively done so, observing that Hartian 'rules' are problematic when you try to use them in historical contexts: it is difficult to identify rules of recognition with any certainty; non-rule based standards (which have important roles in reality) are marginalised by the model, which also does not engage with 'background' features; and there is an incorrect assumption that there is always an analytically correct answer to legal questions.[18] Vinogradoff's intention was to use historical jurisprudence in precisely this way in reforming and developing both future law and ideas about law, and this seems no less intelligent a proposition now than when he made it.[19]

This article considers Vinogradoff's unique version of historical jurisprudence in an attempt to explicitly draw out his contribution to legal theory as it has been, and possible future uses of his insights, in particular in the use of history and empirical data in refining and evaluating

[16] M Lobban, 'Introduction: the tools and the tasks of the legal historian' in A Lewis and M Lobban (eds) *Law and History* (2003) 6 Current Legal Issues 1, p 4.
[17] ibid, p 19.
[18] D Ibbetson, 'What is legal history a history of?' in Lewis and Lobban, above n 16, p 34.
[19] As Peter Stein argued in the 1980s: *Legal Evolution: the story of an idea* (Cambridge University Press, 1980), p 126 and in idem, 'The Tasks of Historical Jurisprudence' in N MacCormick and P Birks (eds) *The Legal Mind: Essays for Tony Honoré* (Clarendon Press 1986), p 304.

analytical models of law. First, I will consider the need for such a method in modern legal scholarship, and some of the challenges it might face. Second, I will discuss what Vinogradoff meant by historical jurisprudence. He believed that only by considering historical data and the contingent facts of human societies could any sort of accurate general propositions about law be formulated. This required the acknowledgement of gaps and flaws in legal doctrine, unlike analytical theories which rely on closed logical models. Third, I will consider to what extent this method did and did not derive from the work of Sir Henry Maine and the German historical school in order both to trace the intellectual history of the method, and to distinguish Vinogradoff's unique contribution from his predecessors'. Finally, I will examine some of the challenges faced by historical jurisprudence then and now. I will argue that the loss, or at least the forgetting, of this method in Anglo-American jurisprudence has had negative consequences for both legal history and legal theory. Historical jurisprudence may be used to understand and evaluate legal doctrine, but also to assess and develop more contextualised legal theory, and as a model for how comparative and historical legal studies might be used together. I will not, however, seek to set out a comprehensive survey of all there is to say about historical jurisprudence past and present (although this would be valuable in reminding us all of the rich intellectual heritage of the ideas we now use), but to start a dialogue about method. Specifically, since there is so clearly a felt need for a methodology which engages law and history in a principled way, a dialogue which recognises and builds on Vinogradoff's model for doing exactly that. As always when exploring the richness of law, there will be much, much more to say.

1. MODERN HISTORICAL JURISPRUDENCE

In modern scholarship, a powerful call for a re-historicising of legal thinking developed out of the American Critical Legal Studies school in the late twentieth century.[20] In the 1970s, the concept of historicism – that is, the idea that a 'social practice or document is a product of the preoccupations of its own time and place'[21] – brought a 'corrective dose of professional historical method' to legal theory which had been absent since Vinogradoff's time.[22] Robert Gordon especially has argued since the 1980s that this historicism, by demonstrating that the meanings of words and actions are to some degree (but not exclusively) dependent on the particular social and historical conditions in which they occur, and are to be interpreted and criticised as such, poses a perennial threat to conventional legal thinking. Gordon argues that legal scholars practice a range of strategies in order to avoid this threat, and that resort to such severely limits the intellectual options and imaginative range of that scholarship.[23] In the nineteenth century, history was used to construct teleology or metaphysics, but Gordon uses it to tear down such structures in his 'antifoundational philosophy of history': it is used to clear ground of structuralist tendencies – including the rival CLS work of Duncan Kennedy.[24]

Historical jurisprudence suggests a model for responding to the threat historicism poses to legal thinking, by combining theoretical models with historical evidence in a two-step process. This is not necessarily a methodology Gordon himself would agree with, as it suggests a tendency to universalism and structuralism,[25] and constitutes a form of 'adaptation theory', which Gordon finds unsatisfactory.[26] Gordon's critique of Kennedy is highly pertinent to Vinogradoff's historical jurisprudence as he seems to fall into the same trap, namely in seeking stable categories (in

[20] See above n 6.
[21] Gordon, 'Historicism', above n 6, p 1029.
[22] C Tomlins, 'Historicism and Materiality in Legal Theory' in Del Mar and Lobban (eds) above n 3, p 58. Tomlins is sceptical of the value of historicism and favours materiality as a standpoint from which to revise legal theory.
[23] C Tomlins, above n 22, p 61.
[24] Ibid p 61. In later work Kennedy moved away from structuralism. See also D Kennedy, 'Three Globalizations of Law and Legal Thought 1850-2000' in D M Trubek and A Santos (eds) *The New Law And Economic Development* (CUP 2006) p 19.
[25] Gordon, 'The Past as Authority', above n 6, p 305.
[26] Gordon, 'Historicism', above n 6, p 1028-1036.

Vinogradoff's case, 'types' of law)[27] behind the varied outcomes of specific and positively enacted rules. Gordon's objection is that those positive rules are in fact all there is to law: whatever forms there may be are so actively created, repeated, and changed by every participant at every level of the legal system so often that those forms are descriptively meaningless.[28] Nonetheless, historical jurisprudence is less exposed to the general objections of historicism than some attempts to use history in law: there is a problem in that either the past is inaccessible by virtue of the fact that it is impossible to reconstruct the mental stance of any historical point and the account is reduced to mere antiquarianism, or the historian must argue that an observer can indeed reconstruct the meaning for the participants of the time, which seems to assume some element of universalism which modern historicists deny.[29] As will be demonstrated, Vinogradoff's use of sociological types seems to bridge this gap, but only by using a structuralist type of account of the sort propounded in Kennedy's early work.

Whilst historical jurisprudence seeks to tackle the historicist threat head-on, what Gordon would call threat-avoidance strategies pose a significant barrier to its use in mainstream legal scholarship, notwithstanding the clear revival in interest and search for a methodology within which history and law can be brought profitably into dialogue from some corners. Legal positivism, the ahistorical analytical mode of thinking about law, makes claims to universal truths. But historical jurisprudence aspires to understanding the same fundamental principles only via 'relative constructions'. This is not a lack of ambition – no one could fairly accuse Henry Maine of that - but as Maine demonstrated, a 'general jurisprudence' which attempted to reveal fundamental principles derived from the 'universal requirements of the human mind' was unhelpful in both analytical jurisprudence and historical approaches. A search for universals inherently involved

[27] Discussed in section 3 below.
[28] Gordon, 'Historicism', above n 6, 1023.
[29] Tomlins, above n 22, p 65.

'cutting off arbitrarily parts of…development for the sake of unity of treatment'.[30] And so, as Twining once observed, pluralism in this context is not 'fence sitting', but a commitment to the variety and richness of law.[31]

This, of course, will not make it any more epistemologically satisfying for those who seek objective truths about law. Analytical jurisprudence in its modern form views questions such as 'what is law' as unanswerable by reference to empirical data, requiring purely analytic engagement with the words used by participants in a legal system.[32] Attempts to contextualise and criticism resulting therefrom are usually dismissed as beyond the scope of the philosophical enterprise. This 'linguistic turn' in legal philosophy, with roots in the Benthamite analytical jurisprudence which always existed as a potent alternative to historical jurisprudence, far eclipsed other legal theories in the mid-twentieth century.[33] Seen in the context of the difficulties historical jurisprudence presented for understanding legal change, the turn to positivism and language may be seen as a resolution of the problem of how to step from the individual to the universal by denying the existence of universal phenomena at all and instead focusing on the individual outcomes of legal rules as language games.[34] Rather than abstracting from reality, as Maine sought to do, this legal philosophy abstracts from the abstract and denies empirical data any role. This resolves the timeless obstacle in deducing an 'ought' (law in future ought to be X) from an 'is' (law in the past has been Y).[35]

This has led more than one legal philosopher to argue that, far from being a philosophy of law, historical jurisprudence is something else, since it does not seek to make universal claims

[30] P Vinogradoff, *Outlines of Historical Jurisprudence,* vol 1 (Oxford 1920-1922), pp 153-4.
[31] W Twining, 'Evidence and Legal Theory' in idem (ed) *Legal Theory and Common Law* (Blackwell 1986) p 64.
[32] H L A Hart, *The Concept of Law,* 3rd edn (Oxford University Press, 2012); J L Austin, *How to Do Things with Words* (Oxford: Clarendon Press, 1962).
[33] Tamanaha, 'The Third Pillar', above n 4.
[34] Hart, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37; N MacCormick, 'Hart: Moral Critic and Analytical Jurist' in idem, *H L A Hart* (2nd edn 2008) p 17.
[35] G Samuel, 'What is (or perhaps should be) the relationship between legal history and legal theory?' (2018) 6(1) Comparative legal history 97, p 97; p 103.

about the nature of law.[36] If the goal of jurisprudence is to establish analytical ideas about what law is as a precursor to being able to consider law in any context, legal positivism is logically prior to any other enquiry about the nature of law, historical or otherwise.[37] But this is based on a particular conception of analytical 'general jurisprudence' as the way to find truths about law which must be universal and necessary.[38] This is only one possible understanding of the enterprise, and – as historical jurisprudence demonstrates - an historically contingent one which can be contrasted with a number of other ways of thinking about law.[39]

Nonetheless, many, perhaps most, theoreticians who have decided to approach law in an analytical way will not wish to contextualise their theories, as this would entail a departure from their basic premises. H L A Hart, for instance, appears to have thought it impossible to have both a general theory of law and an historical account showing the diversity of legal phenomena.[40] This is entirely unobjectionable: a thicker approach to law has plenty of room to appreciate the valuable contribution of analytical jurisprudence alongside other approaches. Analytical jurisprudence offers one particular and sometimes very useful way of thinking about law, which historical jurisprudence can itself integrate and build upon by applying analytical models to the historical facts of different legal systems.[41] In using Vinogradoff's method in this way, it is possible to test the analytical models of law, to perhaps reveal their shortcomings, and to adapt them.

[36] For core examples see J Raz, *The Authority of Law* (2nd edn, Clarendon Press 2009) 104; S J Shapiro, *Legality* (Harvard University Press 2011) 406; J Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012).

[37] As expressed by H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harvard Law Review 44, pp 52-53, and more recently by the late J Gardner, *Law as a Leap of Faith, and other essays on Law in General* (OUP 2012) 273-4. C.f. M Lobban, 'Legal Theory and Legal History: Prospects for Dialogue' in Del Mar and Lobban (eds) above n 3, p 4.

[38] For criticism of this narrowing of jurisprudence see R Cotterrell, 'Why Jurisprudence is not Legal Philosophy' (2014) 5 Jurisprudence 41.

[39] See F Schauer, 'The Path-Dependence of Legal Positivism' (2015) 101(4) Virginia Law Review 957 for a consideration of this relatively recent development in legal positivism; similarly M J Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?' (1997) 17 OJLS 551; G J Postema, 'Jurisprudence, the Sociable Science' (2015) 101 Virginia L Rev 869. For an alternative view relating to the use of legal history, see M Del Mar, 'Beyond Universality and Particularity, Necessity and Contingency: On Collaboration Between Legal Theory and Legal History' in Del Mar and Lobban (eds) above n 3, p 22.

[40] Hart, above n 32, pp 26-27; H L A Hart, 'Review' (1990) 105(416) The English Historical Review 700, p 701.

[41] This is exactly the dialogue proposed by Lobban, above n 37, p 7.

Whilst this may well have little impact on analytical thinking, being derived from different premises, it does offer an alternative way of thinking about law and legal history – and, I would argue, a richer one. It can, for example, reveal lost facets of ideas which have fallen away purely because of path dependence – defined, broadly speaking, as the impact past decisions and experiences have on the development of ideas, with consequent 'roads not taken' - and not because of their inherent lack of merit.[42] It can also test the usefulness of theories,[43] and may show that the actual understanding held subjectively by legal system participants is different to the perspective claimed for them by the theory[44] – one area in particular being the impact of practical concerns on legal developments, as opposed to the impact of the conceptual reasoning which analytical jurists focus on.[45] Finally, whilst positivism chooses not to engage with empirical data, it nonetheless rests on a variety of assumptions about the real world, and if these assumptions are unsound it undermines the entire project from the outset.[46] In this vein, Robert Gordon has argued that legal positivism applied to actual legal systems fails as soon as it is attempted to resolve actual social controversies: this cannot be achieved using a strictly internal logic based on an autonomous legal order (the doctrinal approach).[47] History used in this way can provide counterfactuals to help break through the dogma and momentum that theory can accumulate. Theoretical models often try to freeze law in time in order to describe it, but putting a model to work in historical context shows that this cannot be done meaningfully in relation to law.[48] It forces us to realise that there are many ways of thinking about law, and that different models used at different times will highlight different aspects.

[42] P A David, 'Clio and the Economics of QWERTY' (1985) 75(2) The American economic review 332. Schauer, above n 39, takes precisely this approach in respect of legal positivism itself, see also the response paper by S Watt (2015) 101(4) Virginia Law Review 979. The use of critical legal history to do so as a method is indicated by Gordon, 'The Past as Authority', above n 6, 308.
[43] See Hutchinson, above n 8 on the need for useful jurisprudence.
[44] This is the legal philosophy bereft of 'metaphysical baggage' which Hutchinson enthusiastically calls for: 'Casaubon's Ghosts', above n 8, p 90.
[45] Lobban, 'Dialogue', above n 37, p 13.
[46] Cotterrell, above n 38, p 48.
[47] Gordon, 'Historicism', above n 6, p 1026.
[48] This argument is not new: see Del Mar, above n 39, p 25; S Collini, D Winch and J Burrow, *That Noble Science of Politics* (Cambridge University Press, 1983) describe the contemporaneous attempt to make use of ancient history as offering 'laboratory studies' for theories of politics in a similar way: p 190.

2. VINOGRADOFF'S HISTORICAL JURISPRUDENCE

The way different people and societies have thought about law at different times in Western history was the core of Vinogradoff's historical jurisprudence. In the entry 'Jurisprudence, Comparative' in the 1911 edition of *Encyclopædia Britannica,*[49] Vinogradoff reflected on his method. He described two kinds of comparative jurisprudence: one studied and compared different contemporary legal systems, the other considered how principles had developed within legal systems over time. 'Historical jurisprudence' was itself an aspect of comparative jurisprudence comparing across time, rather than across geographies. Early writers such as Coke, Selden, and Hale had implicitly used such a method in their exploration of the past history of a nation's laws as normatively significant for present and future development.[50]

A. A Science of Law and History

Vinogradoff attempted both to develop a 'scientific' research method influenced by the German historical school and a legal theoretical approach. Maitland was correct that this would surprise readers at the time; even if it has gone unremarked more recently.[51] It has been said that Vinogradoff widened Maitland's horizons, and Maitland helped Vinogradoff to interpret English minds.[52] Maitland was sceptical as to the appropriateness of combining history and philosophy,[53] and claimed to defer on social and economic questions to Vinogradoff because, to him, these

[49] *Encyclopædia Britannica*, vol 15 (11th edn, CUP 1911), p 580.
[50] H J Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 100(7) Yale Law Journal 1651, p 1693.
[51] One scholar who did seem to agree with Vinogradoff's approach was James Barr Ames, who similarly sought to test analysis of rules against historical facts, but Vinogradoff's direct influence on American scholarship seems to have been forestalled by Pound's denunciation: Gordon, 'Historicism', above n 6, p 1041, citing J B Ames, 'Two Theories of Consideration', in idem, *Lectures on Legal History* (1913) p 323; idem, 'The Doctrine of Price v. Neal', in idem, *Lectures on Legal History* (1913) 270, p 284.
[52] A Levett and G O'Brien, 'Obituary' (1926) 36(142) The Economic Journal 310, p 311. Including helping Vinogradoff present his work in English: Vinogradoff, *Villainage*, above n 1, p x.
[53] R W Gordon, 'J Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975) 10 Law and Society Review 9, p 17.

questions were outside the proper remit of legal history.[54] But Vinogradoff disagreed: to separate legal history from other aspects of social life was to miss the point. Maitland knew this - in a letter of 1889 he wrote to his friend:

> You ask me about the Preface [to *Villainage in England*] - well I think it grand work, and on the whole I think it will attract readers because of its very strangeness; but you will let me say that it will seem strange to English readers, this attempt to connect the development of historical study with the course of politics; and it leads you into what will be thought paradoxes.[55]

Rather than generating paradoxes, combining the comparative method with precise historical research was intended to utilise the best of both methods and minimise their shortcomings. This combination enabled Vinogradoff to go beyond what German scholars had so far achieved by applying the German historical method to English materials.[56] Contemporaries admired Maitland as 'intensely cosmopolitan' and attuned to what foreign historians were saying,[57] but Vinogradoff was particularly suited to synthesise: his 'knowledge of the early history of England and English law was possessed by no continental historian or lawyer; and his knowledge of continental history and law was possessed by no English historian or lawyer.'[58] Vinogradoff was the 'foreign critic' with different training who could fill the 'great opening' in scholarship produced by the traditional isolation of English lawyers from continental knowledge.[59] According to Vinogradoff's student Holdsworth:

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[54] Letter from Frederic W Maitland to Reginald L Poole (15 July 1895) in H A L Fisher and F W Maitland, *A Biographical Sketch* (CUP 1910), p 86.

[55] Letter from Frederic W Maitland to Paul Vinogradoff, in ibid, p 49. John W Burrow, 'The Village Community and the Uses of History in Late Nineteenth-century England' in Neil McKendrick (ed) *Historical Perspectives: Studies in English Thought and Society in Honour of JH Plumb* (London, 1974), p 257.

[56] Letter from Frederic W Maitland to Paul Vinogradoff (20 Feb 1889) in Fisher and Maitland, above n 54, p 49.

[57] Patrick Wormald, 'Maitland and Anglo-Saxon Law: Beyond Domesday Book' (1996) 89 Proceedings of the British Academy 1, p 8.

[58] W S Holdsworth and B Pares, 'Sir Paul Vinogradoff' (1926) 4(12) Slavonic Review 529, p 530.

[59] P N R Zutshi (ed) *Letters of F W Maitland*, vol 2 (1995) 11 Selden Society Supplemental p 129; Frederick W Maitland, 'Why the History of English law is not written', reprinted in H A L Fisher (ed), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England,* vol 1 (Cambridge, 1911) 480, p 490.

> [the introduction to *Villainage in England*] was especially valuable to his English readers, both because it brought the English writers and the English theories into line with continental writers and theories, and because it broadened their vision and let in new light upon insular controversies and insular estimates of their own writers.[60]

Maitland also conceded, perhaps with reservations, that:

> …all that you say about Stubbs and Seebohm and Maine is, I dare say, very true if you regard them as European, not merely English, phenomena and attribute to them a widespread significance - and doubtless it is very well that Englishmen should see this - still looking at England only and our insular ways of thinking I see Stubbs and Maine as two pillars of conservatism, while as to Seebohm I think that his book is as utterly devoid of political importance… But you are cosmopolitan and I doubt not that you are right. You are putting things in a new light - that is all - if 'the darkness comprehendeth it not', that is the darkness's fault.[61]

To illuminate the darkness using legal custom and precedent as the data from which principles which had developed over time might be extracted, and providing information as to how future developments might best be formulated, a principled approach was essential. It was not possible or desirable merely to collate information haphazardly. A principle, a rule, or an institution should

[60] Holdsworth and Pares, above n 58, p 532.
[61] Letter from Frederic W Maitland to 'a friend' (12 March 1889) in Fisher and Maitland, *A Biographical Sketch*, above n 54, p 50. Despite this apparent praise, it was clear that Maitland generally disapproved of the comparative method, and any pursuit of general 'laws of progress' which could never be formulated: Frederic W Maitland, *Domesday Book and Beyond* (Cambridge 1897) p 403.

be selected and traced, either through the direct systematisation of recorded facts, or through logical inferences when the recorded facts were inadequate in an attempt to discover general truths at the core of social life. Vinogradoff cited Mommsen, Jhering, and Kohler as examples of the method[62] and it may be inferred that this is a summary of what he learned during his time studying in Germany as a young scholar.

The failure to consider the role of borrowing of concepts[63] had emerged as a further missing element which historical jurisprudence needed to embrace.[64] Vinogradoff emphasised that phenomena which seemed similar but appeared in very different contexts were not necessarily derived from identical or universal causes.[65] It was necessary to consider whether multiple factors might have led to a development, and whether a borrowing from one society to another was likely, given their level of connectedness. Sometimes, outcomes might just reflect similar solutions to similar problems, and it was these examples which might reveal fundamental similarities or timeless truths amongst different cultures.[66]

B. 'External' legal history

It is harder to demonstrate the lasting value of Vinogradoff's work as a legal theorist than as an historian, even though he himself believed that legal history and legal theory should be intimately connected. A key aspect of this was that the examination of history swiftly demonstrated the insufficiency of purely analytic theories of law, with the narrow definitions and assumptions

[62] Paul Vinogradoff, *The Growth of the Manor* (2 edn, George Allen & Company Ltd 1911), p 587.
[63] Nowadays there is a rich literature on 'legal transplants', eg A Watson, *Legal Transplants: an Approach to Comparative Law* (University of Georgia Press, 1993); W Ewald 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 Am J Comp L 489; D Nelken, 'Legal Transplants and beyond: of disciplines and metaphors' in A Harding and E Örücü (eds.), *Comparative Law in the 21st Century* (London: Kluwer, 2002).
[64] K Mantena, *Alibis of Empire* (Princeton 2010), p 85. Maine briefly engaged with the idea in relation to India: Henry Maine, *Dissertations on early Law and Custom* (London 1883), p 45.
[65] Stein, *Legal Evolution*, above n 19, p 104 cites this as a criticism of Maine without apparently noticing that Vinogradoff sought to address it.
[66] *Encyclopædia Britannica*, above n 49, p 585.

of analytic philosophy constantly challenged by historical jurisprudence. Vinogradoff's method offered a different kind of insight into the nature of law by 'grounding' analytic and other legal theories in historical context. This contextual layer provided the potential to consider changing ideas about law over time rather than a static conception of law at any one point.

His personal archive demonstrates that Vinogradoff was an avid reader of *The Times* case reports, keeping many cuttings on matters of professional[67] and general interest.[68] He was clearly able to read, analyse, and use legal cases in his arguments and in his teaching, notwithstanding his lack of formal training or practice as a lawyer. It was not an absence of competence with legal materials which led his scepticism about doctrinal lawyers' conventional approach to law as a rational and closed system – what Hart would later refer to as the internal point of view.[69] The problem was that law formed a 'crust' over the reality of social facts, as 'both an influence and a consequence' which inevitably gave 'a very definite even if a somewhat distorted shape to the social processes which come within its sphere of action'.[70]

The moments where doctrine was most unsound were those where social life was most visible: 'there is no law, however subtle and comprehensive, which does not exhibit on its logical surface seams and scars, testifying to the incomplete fusing together of doctrines that cannot be brought under the cover of one principle'.[71] This was a very different perspective to those who favoured the 'internal' study of legal doctrine: Vinogradoff was wary of oversimplification of complex facts in order to construct logically coherent principles. Complexity and contradiction provide 'insight into the historical stratification of ideas and facts, a stratification which cannot be

[67] Vinogradoff was active in trade union disputes with miners in the 1920s so cuttings include, for instance, *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87.
[68] *Heddon v Evans* (1919) 35 TLR 642, concerning the rights of soldiers, for example.
[69] Hart, *Concept of Law*, above n 32.
[70] Vinogradoff, *Villainage*, above n 1, p 127.
[71] ibid, p 127. It is interesting to note that the question of whether legal principles do in fact succumb and fail to deal with certain complex factual situations would later become a core debate in jurisprudence, for example in Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

abolished however much lawyers crave for unity and logic.'[72] Maine had already begun to explain how modern legal systems utilised fictions, equity, and legislation to close the inevitable gap that opened when social norms changed more swiftly than the law,[73] and Vinogradoff advocated the study of those gaps.[74] These doctrinal scars showed how law had developed:

> …the legal intellect is by its calling and nature always engaged in analysing complex cases into constitutive elements, and bringing these elements under the direction of principles. It is constantly struggling with the confusing variety of life, and from the historian's point of view it is most interesting when it succumbs in the struggle.[75]

Vinogradoff put theory into practice in his historical works, for example when considering the medieval English treatise writer Bracton's use of Roman law,[76] or the complexity of the legal status of medieval villainage.[77] He considered exactly the moments of poor fit or illogic to explain how and why law changed.[78] When this approach was applied more broadly to concepts of law in general it showed that 'there was no one history of human jurisprudence. There were in fact several histories.'[79]

Vinogradoff's perspective included other branches of the 'human sciences', with notebooks full of material on psychology, philosophy, politics, and economics in a variety of

[72] Vinogradoff, *Villainage*, above n 1, p 128.
[73] Henry Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (J Murray 1906) p xvii. In more recent scholarship, it resembles Brian Simpson's model of English common law as a customary law system: Brian Simpson, 'The Common Law and Legal Theory' in Twining (ed), above n 31, p 8.
[74] This is, in fact, comparative jurisprudence in one sense and was consistent with Maine's interest in the gaps between social ideas and law – see Vinogradoff's definition in the *Encyclopædia Britannica*, above n 49; Mantena, above n 64, p 107.
[75] Vinogradoff, *Villainage*, above n 1, p 127.
[76] Vinogradoff, 'The Roman Elements in Bracton's Treatise' (1923) reprinted in *Collected Papers*, vol 1, above n 163, p 237.
[77] Vinogradoff, *Villainage*, above n 1, p 223. For the idea that politics, law, and agriculture were all interlinked in historical jurisprudence generally, see Stein, 'The Tasks', above n 19, who traces it from Montesquieu via Adam Smith.
[78] In the twentieth century, Ronald Dworkin would deploy the same tactic as a critique of Hart: *Taking Rights Seriously* (London: Bloomsbury Academic, 2013), p 105.
[79] Fisher, 'A memoir' above n 163, p 50.

languages. He was unwilling to sacrifice any detail for the sake of simplicity – in what might now be referred to as 'external legal history'.[80] In his own words: 'instead of seeking for the philosopher's stone in the shape of a single theory of law, we had better attend for the present to five or six theories of law derived from different social premises.'[81] But this makes the purview of legal history wide, and requires either a great deal of knowledge vested in one person, or extensive collaboration between fields. Whilst the stringent need for evidence based history to compare from might entail more work than is practical for one scholar alone, and in turn also help to explain the decline of popularity of the method, it means that in modern legal scholarship there is great potential for comparative lawyers and legal historians to make use of Vinogradoff's methodology.[82]

Vinogradoff asked how, precisely, apparently similar processes and institutions had developed in different contexts – an 'ideological approach' more similar to Pound's 'sociological jurisprudence' or Weber's sociology than any legal evolutionary model. Tamanaha has argued that by the 1920s Vinogradoff's work was sociological (rather than historical) notwithstanding that the label was not applied to it.[83] Social scientists like Weber and Coase have had little impact on mainstream legal historical scholarship, especially in Britain, where the focus tends to be on doctrinal models and reconstructing intellectual processes, rather than 'external' explanatory models.[84] One difficulty with using such social scientists' models is that they tend to fail to account for change and timing, and the impact of path dependence.[85] Vinogradoff was aware of this, but nonetheless deployed the ideal of legal types as the basis for his theory of law. He thought that ideas about law were more likely to be consistent across time and place than substantive legal rules,

[80] Gordon, 'J Willard Hurst' above n 53, p 11.
[81] P Vinogradoff, 'The Study of Jurisprudence' in *Collected Papers* above n 160, vol 2, p 205.
[82] The Online Symposium on the European Legal History Society's Journal Comparative Legal History held on 10 June 2020 largely centred on the need for such methodology. A similar process of collaboration within a general framework established by a former wave of scholarship occurred in sociology of law between sociologists and lawyers in the 1960s: P Selznick, 'The Sociology of Law' in R Merton, L Room and L Cottrell (eds) *Sociology Today* (1959).
[83] B Tamanaha, 'The Unrecognised Triumph of Historical Jurisprudence' (2013) 91 Texas L Rev 615, p 628.
[84] J Getzler, 'Law, History, and the Social Sciences: Intellectual Traditions of Late Nineteenth and Early Twentieth-century Europe' in Lewis and Lobban, above n 16, p 224.
[85] Getzler, ibid, p 223. See further above n 42.

since all systems of law had to deal with certain issues, like rules, rights, public and private law, crime and punishment, status and contract. Considering the history of these modes of legal thought (the internal point of view) was likely to reveal the closest thing to universal principles which was possible and these formed the basis of his legal 'types'. This required the expansion of historical knowledge and the comparative method to illustrate the relative successes and failures of different approaches to social and legal problems. By combining this with analytic models which represented the 'dialectical reasoning' and internal logic of the law, a new jurisprudence could be produced.[86]

His turn to theoretical questions was tempered by the fact that 'he did not think that the time had come, and doubted whether it would ever come, when it would be feasible to show the continuous growth of jurisprudence upon the planet in a single picture.'[87] He nonetheless began an attempt,[88] as an 'outline' to be further developed by future scholars.[89] Even then, what was outlined was not 'a' theory of law, but several model types drawing on different historical contexts[90] – one of which was based on analytical jurisprudence:

> its solid achievements consist in the analysis of certain formal conceptions of positive law. It helps to explain the working of the machinery by which the legislative power puts the rules decreed by it into operation by means of courts of law and of the police. It does not solve the problems of the origin of legal rules and of their relation to the life of society.[91]

[86] Vinogradoff, 'The Study of Jurisprudence', above n 81, p 214.
[87] Fisher, 'A memoir' above n 163, p 49.
[88] Vinogradoff, *Outlines*, above n 30.
[89] Fisher, 'A memoir' above n 163, p 47.
[90] The types were the totemistic, the tribal, the ancient city state, the medieval system of feudalism and canon law, and modern industrial society.
[91] Vinogradoff, *Outlines*, above n 30, p 123; p 157. For a more recent conceptualisation of legal positivism as an ideal type see F Pirie, 'Legal Theory and Legal History: A View from Anthropology' in Del Mar and Lobban (eds) above n 3, p 39.

Late in life, Vinogradoff focused on 'the application of historical tests [to show the weaknesses of] analytical jurists and of those philosophers who looked to a social compact as the origin of society'[92] – an essentially historicist position in contrast to Maine's universalist aspirations.[93] Vinogradoff believed that legal positivism was 'incomplete and barren', too state-centric and dismissive of any legal system not directly linked to state power.[94] This was true of analytic models in both law and history: Fustel de Coulanges' attempt to use an analytic method of history proved this.[95] It should have been clear after Savigny had demonstrated the role of tradition and 'unconscious organic growth' that any 'utopian doctrines of political rationalism' were imperfect.[96]

Vinogradoff recognised the difficulty here: he knew that model types were artificially static and did not recognise that ideas themselves were 'mobile entities' which passed through stages of their own, from 'indistinct beginnings, gradual differentiation, struggles and compromises, growth and decay'. This was an inevitable limitation, and could only be countered by combining work from both sides of the problem – bringing together static and dynamic portraits.[97] The method therefore 'runs out' at this point, but explicitly setting this problem out was undoubtedly a key development. He explicitly acknowledged that legal change was a phenomenon in need of explanation, but was confident that another scholar would address this point to fill in the gaps of his attempted outline.[98] And yet, even a hundred years later, whilst legal historians often say that law changed to meet social needs, Gordon found they rarely attempt to state what these social needs were, how they originated, or how they changed over time.[99] In contrast, the notion that

[92] Fisher, 'A memoir' above n 163, p 32.
[93] B Tamanaha, 'How History Bears on Jurisprudence' in Del Mar and Lobban (eds) above n 3, 329, 334.
[94] Vinogradoff, *Villainage*, above n 1, p 1.
[95] P Vinogradoff, *Russian thought* (January 1980), reproduced in A Meyendorff (trans), 'Sir Paul Vinogradoff: A Bibliographical Appreciation' (1926) 5 Slavonic Review 157, p 158.
[96] F K von Savigny, *On the Vocation of Our Age;* H Kantorowicz, 'Savigny and the Historical School of Law' (1937) 53 LQR 326; Vinogradoff, *Villainage*, above n 1, p 10.
[97] Vinogradoff, *Outlines*, above n 30, p 160.
[98] ibid, p 160.
[99] Gordon, 'Historicism', above n 6, p 1029-1030.

types of legal thinking are associated with types of society has been so successful it is now commonplace.[100]

3. DEEP ROOTS: MAINE AND THE GERMAN HISTORICAL SCHOOL

Vinogradoff's refinements of historical jurisprudence rested on the original model conceived by Sir Henry Maine. If Vinogradoff is to be rehabilitated, his relationship with Maine should be made explicit, for two reasons. Firstly, because any enterprise seeking to reveal the intellectual roots of historical jurisprudence needs to do so: Maine is credited as having founded the English branch of the school which compared legal developments across time and place,[101] giving English jurisprudence an independent identity separate from legal practice and utilitarian theory.[102] But Maine had limited interest in developing or describing a precise methodology,[103] often presenting generalisations 'as if by inspiration'[104] and rarely engaging with his critics. The second reason, then, for making explicit the connections between Maine and Vinogradoff is to disassociate the latter, where appropriate, from some of the more obviously problematic aspects of the work of the former.

A. Maine's Methodology

In the closest Maine came to describing his methodology, he envisioned the investigation of the history and principles of law by comparing communities both historically and

[100] Gordon, 'Past as Authority', above n 6, p 287.
[101] Collini, Winch and Burrow doubt whether the comparative approach was really novel in the 1860s rather than a consistent feature of 'whiggish' approaches to history, but it is certainly the case that this was the period and the author who popularised the comparative and historical jurisprudence; above n 48, p 185.
[102] Cocks, *Maine*, above n 14, p 77.
[103] Ibid, p 149; idem, 'Sir Henry Maine: 1822-1888' (1988) 8(3) Legal Studies 247, p 252.
[104] M E Grant Duff, *Sir Henry Maine: a brief memoir of his life* (New York: Henry Holt and Co 1892) p 80; 'Obituary: Sir Henry Maine', 11 February 1888 Saturday Review, p 150.

philosophically.[105] Simple comparison took the legal systems of two distinct societies to compare their overall approach to a single topic without regard to history, but comparative jurisprudence was something more. Maine was inspired by[106] comparative philology and mythology's investigation of temporal relationships between 'parallel' phenomena and he wanted to compare not just across space but across time.

His method had some commonalities with,[107] but differed from, the approach of the German historical school, which may or may not have directly influenced him.[108] Maine's approach lacked the specificity and attention to detail epitomised by the German school:

> When one passes from a survey of English historiography to German historiography, one is at once struck by a difference both in methods and purpose… The place of a general narrative is taken by research work, the place of broad problems by special topics.[109]

But unlike the German school, Maine's approach was comparative as well as historical, and it was not constrained by a concept of semi-sacred national tradition.[110] The German school had its own flaws: historical investigation tended to progress from the focal point of political institutions or general culture and external growth, whilst ignoring agricultural (economic) facts, class, and legal organisation.[111] It could be a deeply nationalist viewpoint which was dismissive of other cultures

[105] H Maine, *Village Communities in the East and West: Six Lectures Delivered at Oxford with other lectures, addresses and essays* (1st edn 1871; New York: Henry Holt and Co 1889), p 6.
[106] Mantena described comparative philology as an 'inspirational analogy' rather than a methodological model: Mantena, above n 64, p 74.
[107] In any case the lack of a recognised Mainian school makes it temptingly easy to align him with the German school when categorising: Cocks, *Maine*, above n 103, p 248.
[108] The school is thought of as founded by Frederick Charles von Savigny, whose views can primarily be found in *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward trans, London: Littlewood, 1831). It is questionable how far Maine engaged with the substantive arguments of the German scholars: see Cocks, *Maine*, above n 14, p 24-27. It has been argued that Maine was nodding to a shared intellectual culture rather than to the substance of the German scholars' works: Cosgrove, above n 9, p 126; and alternatively that he was heavily influenced by Niebuhr: N O'Brien, ''Something older than law itself': Sir Henry Maine, Niebuhr, and 'the path not chosen'' (2005) 26(3) JLH 229; or by both Niebuhr and Savigny: Mantena, above n 64, p 65; p 100.
[109] P Vinogradoff, *The Journal of the Ministry of Education* (Russian, December 1883), reproduced in Meyendorff, above n 95, p 164.
[110] P Vinogradoff, 'The Teaching of Sir Henry Maine' (1904) 20 LQR 119, reprinted in Collected Papers, vol 1, above n 163, p 173; p 180.
[111] Vinogradoff, *Villainage*, above n 1, p 25.

and the knowledge to be gained from their study, and hence was not open to insights from the comparative method.[112] In fact, influential as it was, Vinogradoff thought the German approach was rapidly 'antiquated' because of its narrowness in being both unable to approach issues comparatively and unable to account for conscious growth.[113] Maine[114] and Jhering[115] respectively had sought to address these issues, demonstrating that the German historical method alone was insufficient.

This is useful, but falls something short of a full methodology: Maine was generally content to describe the history of a system or theory, and leave it to others to test the accuracy of both his claims and his method.[116] In many ways, Maine's interests were practical, not theoretical: he was concerned with the effective governance of India;[117] Irish land law; [118] and the reform of legal training and education.[119] This may help explain his lack of abstract methodology: rather, his work should be seen through the 'lens of his preoccupations'.[120] Less generously, contemporaries described Maine as 'hasty'[121] or even lazy,[122] producing 'odd results' with 'lapses in detail'[123] – perhaps then, he simply did not want to do the work involved.

By the time Vinogradoff was appointed to Maine's former Oxford chair,[124] criticisms of Maine had accumulated. Vinogradoff launched a defence of Maine in his inaugural lecture: his predecessor had not aimed to produce minute research with precision and fine attention to detail,

[112] Vinogradoff, 'Teaching' above n 110, p 181.
[113] Vinogradoff, *Outlines*, above n 30, p 135.
[114] H Maine, *The Effects of Observation of India on Modern European Thought: The Rede Lecture 1875* (London 1875) p 23.
[115] R von Jhering, *The Struggle for Law* (J Lalor trans, Chicago, 1915).
[116] J F Stephen, (1861) 114 Edinburgh Rev 456, p 482.
[117] Maine was particularly influential in the adoption of a policy of 'indirect rule': see generally Mantena, above n 64.
[118] Burrow, above n 55, p 256; Clive Dewey, 'Celtic Agrarian Legislation and the Celtic Revival: Historicist Implications of Gladstone's Irish and Scottish Land Acts 1870-1886' (1974) 64 Past & Present 30.
[119] Peter Stein, 'Maine and legal education' in Alan Diamond, *The Victorian Achievement of Sir Henry Maine* (2006), p 195.
[120] Cocks, *Maine*, above n 14, pp 52-53.
[121] Duff, above n 104, p 7; p 80.
[122] Cocks, *Maine*, above n 14, p 250 per James Fitzjames Stephen; G Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822–1888* (New York: Humanities Press 1969) p 174; p 245.
[123] Sir Frederick Pollock to Frederick Maitland, 28 Dec 1900; 26 Oct 1902, Frederick Maitland Papers, Cambridge University Library; see further Cosgrove, above n 9, p 142.
[124] Brian Simpson, 'The Corpus Chair and Oxford Jurisprudence as Evolved by 1952' in idem, *Reflections on 'The Concept of Law'* (Oxford University Press, 2011) 17.

but had tried to delineate the broad aspects of an emerging subject area:[125] a sketch, not a detailed survey.[126] 'Cheap criticisms' of Maine based on his lack of precision judged him by a standard which he had never aspired to,[127] and failed to consider his success as a 'force in European thought'. Maine's achievement had been in connecting German historical research with Victorian ideas about the scientific method and universal laws,[128] and the impact of his work is demonstrated, inter alia, by the tendency to associate him with Darwin.[129] Vinogradoff knew that Maine had been biased towards one version of history, and that he had used a confusing array of sources and neglected facts which might have contradicted or disordered his narrative.[130] However, he argued it was possible to take the best parts of Maine's method and move beyond his limitations and biases.[131]

The flaws inherent in Maine's method were obvious, even to him.[132] He was using the new 'scientific' method to search for 'laws of development' and broad generalisations.[133] Bias and careless assumptions of comparability could easily arise, and expressly seeking an even-handed selection of materials represented something of an innovation. Nineteenth century historical writing had only recently metamorphosed from a narrative, literary activity into a type of reasoned

[125] Vinogradoff, 'Teaching' above n 110, p 174; pp 183-185.
[126] Vinogradoff, *Villainage*, above n 1, 28. More recently the same point has been made by Rodney Hilton, 'The Content and Sources of English Agrarian History before 1500' (1955) 3(1) The Agricultural History Review 3, p 4.
[127] Criticism of a writer for failing to come up with an idea which they are, in retrospect, required to develop is precisely the phenomenon Quentin Skinner referred to as part of the 'mythology of doctrine' in 'Meaning and Understanding in the History of Ideas' in Quentin Skinner, *Visions of Politics* (CUP 2002) p 67. Pollock had made this point about Maine as early as 1888: (1888) Edin Rev 1, p 6.
[128] Stein, *Legal Evolution,* above n 19, p 90.
[129] Henry Maine, *Dissertations on early Law and Custom* (London 1883) p 361; 'Obituary: Sir Henry Maine' in Humphrey Ward (ed) *Eminent Persons: Biographies Reprinted from the Times, vol 4, 1887-1890 (*London MacMillan 1893) p 25; Feaver, above n 122, p 43. It is doubtful how familiar Maine was with the substance Darwin's ideas, or how committed Maine or even Vinogradoff really were to the idea of 'science' in history – the association is by virtue of impact, not substance: Feaver, above n 122, p 44; Kenneth E Bock, 'Comparison of Histories: The Contribution of Henry Maine' (1974) 16(2) Comparative Studies in Society and History 232, p 236; Krishan Kumar, 'Maine and the Theory of Progress' in Diamond (ed), above n 119, p 78.
[130] Vinogradoff, *Villainage*, above n 1, pp 29-30.
[131] Vinogradoff, above n 110, p 189. See also Cocks, *Maine*, above n 14, p 150. This developmental arc from grand theory to method is not dissimilar to Selznick's description of the development of sociology, to which historical jurisprudence was related, most notably via Weber. Arguably historical jurisprudence is only now reaching the third and final stage of 'intellectual maturity': Selznick, above n 82, p 115.
[132] Maine, *Village Communities*, above n 105, p 7.
[133] Vinogradoff, *Villainage*, above n 1, p vi. Amusingly, Vinogradoff foresaw that the history of the nineteenth century would include an 'important and attractive' chapter on the development of historical writing: ibid, p 1. For a summary of the difficulties encountered by early legal science see M D A Freeman (ed), *Lloyd's Introduction to Jurisprudence*, 8th edn (London: Sweet & Maxwell, 2008), p 6-8.

knowledge which used past events to understand social life.[134] Writers like Blackstone[135] may well have deployed history in a distorted fashion to evidence a preferred theory, as Vinogradoff accused,[136] but doing otherwise may not have even occurred to them. Even in Vinogradoff's time, his friend and contemporary Seebohm was criticised for using only one type of source, selecting only facts which supported his views,[137] and relying on forged documents.[138] But this 'vulgar mode' of historical study was accessible and impactful, so it remained popular.[139]

Maine had generalised too readily, but his objections to abstraction had cleared the ground[140] by demonstrating that Bentham and Austin's analytical jurisprudence was unsatisfactory as a complete legal theory.[141] Their abstraction, and the necessity of excluding from consideration at least some of the many complex elements of politics, religion, custom, tradition, and imitation that went into legal thought made it impossible to use analytical jurisprudence to understand phenomena in the real world.[142] Maine used Indian customary law very successfully to show that analytical jurisprudence simply could not cope when confronted with law which was not command based.[143] The empirical and contextualised method that Maine advocated - even if he often fell short of his own standard – was a useful and a valid way to build legal theory.[144]

Vinogradoff set out develop this and to give English historical jurisprudence a clear methodology[145] based on a rigorous evidence-based approach to the sorts of questions which

[134] Maine, *Village Communities,* above n 105, p 266.
[135] Vinogradoff, *Villainage,* above n 1, p 9.
[136] This comment was made specifically in relation to, but was not limited to, Coke, who Vinogradoff saw as seeking to use history to illustrate the present through selective interpretation of case law: ibid, p 5.
[137] Evgeny A Kosminsky, 'The Hundred Rolls of 1270-80 as a source for English Agrarian History' (1931) 3(1) Economic History Review 16, p 20.
[138] Sir Paul Vinogradoff, 'Obituary - Frederic Seebohm (1833-1912)' in *Collected Papers*, vol 1, above n 163, p 276.
[139] Collini, Winch, Burrow, above n 48, p 186. This description from John Stuart Mill might be taken as a direct commentary on Maine, or Mill himself: p 155.
[140] ibid pp 175-177; citing Maine, above n 129, p 192.
[141] Collini, Winch, Burrow, above n 48, p 211; Henry Maine, *Lectures on the Early History of Institutions* (New York 1875) p 365 365; 563.
[142] Vinogradoff, above n 110, p 177, citing Maine, *Institutions*, above n 141, p 361.
[143] Collini, Winch, Burrow, above n 48, p 216; Mantena, above n 64, p 50.
[144] Vinogradoff, above n 110, pp 180-183.
[145] Holdsworth and Pares, above n 58, p 530.

Maine had often raised but not examined in detail.[146] Maine had used few English historical materials and preferred to draw examples from the more 'scientific' Roman law in exploring proposed legal universals.[147] But the late nineteenth century 'archival revolution', wherein scholars like Vinogradoff and Maitland closely investigated historical primary sources, enabled a sort of research based history which would have been practically difficult to achieve in Maine's time. Vinogradoff engaged in the close study of English history in both published and unpublished records, and substantiated his claims in detail rather than making the broad generalisations Maine was famous for.[148] Dewey has argued that Maine's approach allowed English scholars to be free of reliance on greater German technical competence and to effectively develop their own data set using the comparative method - in Maine's case focusing on India - instead of having to work exclusively on fragmentary medieval documents.[149] The spree of publication and editing of primary sources at the end of the century[150] enabled not just the construction of evidence based claims in general, but the falsification of generalisations: with the detailed evidence more available and accessible, it became harder to defend sweeping claims.

Maine had also emphasised the use of comparison to help fill gaps in knowledge or historical evidence, comparing across both time and space. Using both types of comparison enabled illustration of the development of legal doctrines, and the comparison of similar processes and institutions to extend from specific examples to general conclusions without departing from the scientific commitment to evidence-based claims.[151] The resort to comparison was also in part to remedy the gaps in historical evidence, as any strictly local approach would inevitably be full of unknowns. Maine had realised that in order to fill these gaps, evidence from 'kindred processes'

[146] M Lobban, 'Introduction', above n 16, p 19.
[147] Maine, *Ancient law,* above n 73, p 116; see also Mantena, above n 64, p 100 on Savigny's influence on Maine's understanding of Roman law as 'scientific'.
[148] R Cocks, 'Maine, Progress and Theory' in Alan Diamond (ed) above n 119, p 70.
[149] Clive Dewey, 'Images of the Village Community: A Study in Anglo-Indian Ideology' (1972) 6(3) Modern Asian Studies 291, 306.
[150] This included the establishment of the Selden Society and involvement in the first three dozen of its publications, and Vinogradoff's editorship of both the British Academy volumes in Records of the Social and Economic History of England and Wales and nine volumes of the Oxford Studies in Social and Legal History series.
[151] Vinogradoff, above n 110, p 184; *Encyclopædia Britannica*, above n 49, p 580.

could be used.[152] If Dewey is correct that Maine's expansive comparative method was in part a response to the inability of English scholarship to compete with German research,[153] Vinogradoff's version narrowed the scope of the method again by requiring that comparison be used *as well as*, not *instead of*, technical historical research. To Vinogradoff, comparison was suggestive rather than conclusive, but he agreed that it could help evidence the possibilities where there were breaks in recorded history.[154] If the inference was not supported by evidence, or the evidence could go either way, he generally said so – but because Vinogradoff knew more about continental social history than most, if not all, of his English contemporaries he was able to more confidently and accurately make those comparisons.[155] Since Vinogradoff also taught English scholars how to engage in precise historical research through his seminars at Oxford, it was in him that the two schools fully met.[156]

B. Stages and Types

Whilst it was no longer true that historical research comprised of 'two extremes of minute research leading to no general results and general statements not based on any real investigation into facts',[157] the new approach was still developing and required refinement, with more stringent standards of criticism and more 'exact' methods.[158] The building of 'dogmatic doctrine on the foundation of abstract principle and by deductive methods' ought to give way to 'an exact study of facts in their historical surroundings, and to inquiries into the shifting conditions under which the problems of social economy and law are solved by different epochs'.[159] This was an approach

[152] Vinogradoff, above n 110, p 185; this was also Bryce's approach to comparative jurisprudence, see Stein, *Legal Evolution*, above n 19, p 119.
[153] Above n 118.
[154] *Encyclopædia Britannica*, above n 49, p 584.
[155] D M Stenton, *English Justice between the Norman Conquest and the Great Charter* (Philadelphia 1964) p 16.
[156] For Vinogradoff's assessment of the status of English university education, see P Vinogradoff, 'Oxford and Cambridge Through Foreign Spectacles' in Collected Papers, vol 1, above n 163, p 277.
[157] Ibid, p 3.
[158] *Encyclopædia Britannica*, above n 49, p 584.
[159] Vinogradoff, *Villainage*, above n 1, p 3.

derived from the scientific method, and modelled on the German historical school with its powerful reputation for meticulousness, but newly adapted for English scholarship. A key first step for Vinogradoff was to avoid the one-sided examination of historical facts and 'uncritical accumulation' which discredited the method and led to criticisms of Maine.[160] Rather than postulating a framework like 'status to contract' and searching for details in history, Vinogradoff sought to proceed from details outwards, constructing theory built on evidence of local life.[161]

Vinogradoff was also unenthusiastic about searching for universal laws – contrary to the trend of his time to search for the laws of 'legal evolution'.[162] Unsurprisingly, given his personal history,[163] he had a distaste for Marxism's over-simplification of social life into economic factors at the cost of treating all other aspects as subordinate.[164] Any analyses which linked economic stages with 'necessary' institutional features (as opposed to commonly occurring ones) was problematic. For example, the domination of agricultural labourers by a ruling class was a recurring feature in different places, with different cultures. But it did not follow that particular ways of life were necessitated by this, as Frederic Seebohm had argued.[165] Even within England, inheritance customs which seemingly had completely opposite aims existed side by side in medieval communities with near identical economic and lordship conditions. This helped to disprove the idea that a given economic condition would strictly determine all the legal customs and social structures in a society. But it was possible to find patterns of common features without being deterministic about them.[166] The fact that the inheritance custom of Borough English was

[160] Vinogradoff, 'The Study of Jurisprudence' above n 81, p 208.
[161] Vinogradoff, *Villainage*, above n 1, p 12; Palgrave, *History of the English Commonwealth* (Murray 1832); Palgrave, *Normandy and England* (London: Macmillan 1840). How possible it is to approach materials in a value-free way has since been considered in depth by Skinner, above n 127.
[162] See generally Stein, *Legal Evolution,* above n 19.
[163] Vinogradoff was forced out of Russia in 1903 for being too liberal, and although he continued to return regularly for many years after, 1917 decisively severed his ties with the country and precipitated an application for British citizenship: H A L Fisher, 'A Memoir' in idem (ed) *The Collected Papers of Sir Paul Vinogradoff*, vol. 1 (Oxford: Clarendon, 1928), p 59.
[164] ibid, p 67; Vinogradoff, *Villainage*, above n 1, p 31.
[165] Maxime Kovalevsky had made the same point in relation specifically to Seebohm's work: 'The Origin and Growth of Village Communities in Russia' (1888) 1(4) The Archaeological Review 266.
[166] *Encyclopædia Britannica*, above n 49, p 586.

common amongst the medieval unfree was part of why it came to be associated with tests of unfreedom: whilst it was not a requirement that the unfree had this custom, it was commonly true that they did, and discovering if this was caused by a preference or lordship pressures (or both) revealed something of medieval ideas and ways of living even if it did not reveal any universal laws.

Maine's historical jurisprudence was accused of being predicated on false necessary chronological stages of history – a 'Whiggish history writ large' in the words of a modern commentator.[167] It is a debated question how evolutionary Maine's historical jurisprudence was,[168] but he claimed at least some 'primitive' societies became 'progressive', and that the features involved in this transition in 'Aryan' societies could be identified and described.[169] However, even Maine recognised that 'static' societies did not necessarily or deterministically evolve into 'progressive' ones,[170] and that not all societies would exhibit all features in the same way. He recognised the possibility of different lines of progress, but his particular outline was presented as the story of how one type of 'primitive' or static society *had* in fact become 'progressive' in Western Europe.[171]

When Vinogradoff built on Maine's work, he attempted to develop from this line of thinking a theory of social change and how it related to legal change. This was arguably sociological rather than strictly legal or historical: Gordon described the attempt as 'comparative history of sociology' which bridged the gulf between dogmatic legal thinking and the requirements of the historical method.[172] As other influential thinkers like Spencer and Durkheim had found, it was difficult to go beyond description and to explain change over time. Maine's use of an idea of

[167] Getzler, 'Intellectual Traditions' above n 84, p 215.
[168] J Burrow, 'Henry Maine and mid-Victorian ideas of progress' in Diamond (ed) above n 119, p 56.
[169] K B Smellie, 'Sir Henry Maine' (1928) 22 Economica 64, p 80; Vinogradoff, above n 110, p 187.
[170] Smellie, 'Sir Henry Maine' 80.
[171] Vinogradoff described it on more causal terms as a map to how static could become progressive, but this overlooks the fact Maine gives no explanation of causation: Vinogradoff, 'Teaching' above n 110, 187.
[172] Gordon, 'Past as Authority', above n 6, p 286-7.

evolution may have been an attempt to engage with the problem of how one type of society changes into another over time,[173] but Maine never attempted to explicitly explain legal change.[174] It is arguable, given the challenges in theorising such a topic, that his idea of progress, defined as being able to adapt and to stay adaptable, was sufficient for his purposes.[175]

Vinogradoff was the only one who tried to systematically relate Maine's theoretical ideas to progress and change concepts,[176] and Cocks described Vinogradoff's reward for loyalty to Maine as 'intellectual isolation'.[177] This is very true of his *Outlines of Historical Jurisprudence*.[178] The work was not complete on his death, and is not now well know or used – perhaps because it is guilty of many of the same unfounded generalisations as Maine's work: Brian Simpson described it as 'largely and deservedly forgotten'.[179] As with Maine, a chronological scheme of stages is presented without resolving the problem of change.[180] In fact, it may be a worse problem for Vinogradoff: there is a taxonomy at the broadest level of recognising Weberian social types, but not even a Whiggish progression to tie it together.[181]

Nonetheless, Vinogradoff's method did not, as Roscoe Pound claimed, break with Maine's 'historical jurisprudence' in favour of fact-based 'legal history':[182] Vinogradoff argued that the latter was an essential foundation for the former. Maine's claim to depart from the narrative history which characterised the writings of Freeman or Stubbs bared him to a new kind of criticism which he was not prepared to meet: the historicist one. Narrative history was not susceptible to historicist

[173] Getzler, 'Intellectual Traditions' above n 84, p 225. C.f. Kumar, above n 129.
[174] Cocks, 'Progress', above n 148, p 72.
[175] Kumar, above n 129, pp 79-87.
[176] Cocks, 'Progress', above n 148, p 75.
[177] Cocks, *Maine*, above n 14, p 187.
[178] Vinogradoff, *Outlines*, above n 30.
[179] Simpson, above n 124, p 27.
[180] Getzler, 'Intellectual Traditions' above n 84, p 223; P A David, 'Clio and the Economics of QWERTY' (1985) 75(2) The American economic review 332.
[181] Christopher Parker, 'Paul Vinogradoff, the Delusions of Russian Liberalism, and the Development of Russian Studies in England' (1991) 69(1) The Slavonic and East European Review 40, 42; and in general Collini, Winch and Burrow, above n 48.
[182] Roscoe Pound, 'Review of Outlines of Historical Jurisprudence Vol 1' (1921-1922) 35 Harvard Law Review p 774. This claim would be much more true of Maitland.

criticism because it was not evidence-based, but Whiggish ideas of progress which claimed to be based on history were exposed to exactly this,[183] as Seebohm swiftly demonstrated with his Romanist response to Maine.[184]

4. THE DECLINE OF HISTORICAL JURISPRUDENCE

Historical jurisprudence offered an opportunity to free law from the 'merely dogmatic' or strictly technical approach:[185] Vinogradoff's method offered a framework for combining social theory, history, and analytic models of law. But it has been forgotten by modern jurisprudence. In one particularly depressing analysis:

> The historical jurisprudence to which Vinogradoff aspired – a discipline which would bring history, psychology and the social sciences into dialogue with philosophical analysis of law – stands, a century after its conception, as little more than a footnote in contemporary study of the history of jurisprudential ideas (and as yet less than that in conventional jurisprudential study).[186]

Rodney Hilton, an historian, once said that scholars tend to use both Vinogradoff and Marc Bloch as a source of illustrative material rather than as theorists in their own right.[187] Bloch's comparative method for social history was strikingly similar to Vinogradoff's, and also sought to describe patterns, avoiding sociological determinism and generalisation, but utilising comparison of minute local history with parallels elsewhere, or from a different time.[188] Like Vinogradoff, he believed

[183] J W Burrow, *A Liberal Descent* (Cambridge University Press, 1981), p 20 briefly considers this point.
[184] Frederic Seebohm, *The English Village Community* (London: Longmans, Green, and Co, 1883).
[185] Lobban, above n 16, p 19.
[186] Lacey, above n 15.
[187] R Hilton, *The English Peasantry in the later Middle Ages: The Ford lectures for 1973 and related studies* (Oxford: Clarendon 1975) p 4.
[188] Getzler, 'Intellectual Traditions' above n 84, p 258; J A Raftis, 'Marc Bloch's Comparative Method and the Rural History of Medieval England (1962) 24 Medieval Studies 349, p 355.

that law was a formal covering over diverse realities which comparative study could expose.[189] But the impact of Bloch's 'Annales' school on modern (historical) thought has been much greater than Vinogradoff's – in part because of the difference between social and legal history. Hilton thought Vinogradoff's legal focus did not sit well with sociologists – if true, this means Vinogradoff was too much of a lawyer for non-lawyers and not enough of one for lawyers themselves. Analytical jurisprudence and legal positivism have proven more popular than the historical approach in legal theory, and in legal history a doctrinal approach has prevailed.[190] This is a long way from Maine's hope that 'general jurisprudence' and legal history would become the heart of legal education.[191] As Bloch observed in the 1930s, English historical jurisprudence apparently stopped dead with Vinogradoff.[192]

The decline had begun before Vinogradoff's death, and has been variously attributed to problems with the concept of 'legal evolution'; the distasteful ideas of social Darwinism; and outmoded or supremacist attitudes.[193] O'Brien, who is in a minority in arguing that Vinogradoff developed 'a specific, intellectually ambitious and coherent vision of what historical jurisprudence might become',[194] still argued that Vinogradoff's German teaching style was off-putting for English students and contributed to the decline of the school.[195] Some argue that Vinogradoff and Pollock failed to clearly articulate a systematic theory of law based on the historical method and this was a cause of decline.[196] Pollock's work is certainly susceptible to this criticism: he was not really an advocate of the method and was sceptical of philosophy of law in general – despite being Maine's

[189] Raftis, ibid, 356-357.
[190] *Encyclopædia Britannica*, above n 49, p 587. In a recent article, Russell Sandberg made precisely this point: 'The time for legal history: some reflections on Maitland and Milsom fifty years on' (2018) 180 Law & Justice 21, p 25.
[191] Lobban, above n 16, p 1.
[192] Raftis, above n 188, p 355.
[193] Stein, *Legal Evolution,* above n 19; Elliot, above n 14; Getzler, 'Intellectual Traditions' above n 84, p 256; Lacey, above n 15; Tamanaha, 'Third Pillar', above n 4, p 2250; Samuel, above n 35; A Diamond, 'Introduction' in idem (ed), above n 119, p 5; C Woodard, 'A wake (or awakening?) for historical jurisprudence' in Diamond (ed), above n 119, p 217.
[194] N O'Brien, ''In Vino Veritas': Truth and Method in Vinogradoff's Historical Jurisprudence' (2008) 29 The Journal of Legal History 39, p 42.
[195] ibid, p 39.
[196] Tamanaha, above n 4, p 2250; Lacey, above n 15, p 919.

chosen successor at Oxford and holding a chair requiring he teach historical jurisprudence.[197] Cocks has even argued that Pollock actively tried to restrict Maine's impact.[198] But Vinogradoff did actively try to perpetuate the school: although his interests '[lay] in a field far removed from the high roads of popular learning'[199] which would do little to help with exam performance, his methodology was undeniably an important contribution, not least because he introduced seminar style teaching at Oxford.[200] As one of his students put it: '…what Vinogradoff passionately desired to teach was not so much a subject, as method – the methods of research in social and legal history.'[201]

Vinogradoff was guilty of some of the failings characteristic of users of historical jurisprudence. He was determined in his historical research to see similarities between the Russian village community or *mir* and the English medieval community: his early project was to identify rules of progress by which Russia might benefit.[202] Like Maine, he sometimes made unwarranted inferences: for example the belief that there were traces of an ancient communism in the form of land re-allotment on English manors on the same model as contemporary Russian villages.[203] But we can also see the value of his sustained attempt to utilise the best of both Maine's ideas and the German historical school's method in his legal historical work on villeinage, field systems, and on royal manors.[204]

The sharp decline in the popularity of historical jurisprudence also relates to an attitude amongst the legal community that legal historical knowledge was unnecessary for the practising

[197] For Pollock's apparently intentional avoidance of theory building, see Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP 2004) pp 7; 49. Simpson, above n 124, 25.
[198] Cocks, *Maine*, above n 14, p 185.
[199] Fisher, 'A Memoir' above n 163, p 3.
[200] Students of Vinogradoff included the legal historian Holdsworth, the Roman lawyer Zulueta, and medieval historians including Cam and F M Stenton.
[201] F de Zulueta, 'Paul Vinogradoff 1854-1925' (1926) 42 LQR 202, p 206.
[202] Vinogradoff, *Villainage*, above n 1, p 5.
[203] ibid p 254.
[204] Generally, Vinogradoff, *Villainage*, above n 1, p 5; and *Growth*, above n 62.

lawyer.[205] A rational, perhaps even static, description of legal doctrine is more comprehensible and practical for teachers, students, and practitioners. A rejection of taxonomy or rational organisation of legal concepts in favour of historical investigation was not generally as useful for lawyers' practical purposes, although it could be used to inform legal reform.[206] It has been claimed that historical jurisprudence was inherently resistant to legislative reform – but whilst this was true of Maine (who favoured codification and rationalisation but not changes to the substance of the law or reform),[207] Vinogradoff used it otherwise.[208] The latter wanted to actively deploy historical jurisprudence to inform future laws by understanding what sorts of laws worked in different contexts.[209] Recently, other scholars have seen the potential for history to provide a contextualised understanding of law to criticise and reform: Gordon has argued that where a legal rule is 'chronically maladapted' to its purpose and/or potentially never actually operated as stated, doctrinal legal scholarship may fail to explain or even acknowledge this point without it – a sentiment Vinogradoff would have agreed with.[210] The outcome of the focus on doctrine is a lack of exactly the appreciation of historical development which Vinogradoff thought was necessary in understanding law and how it ought to develop in future.

CONCLUSION

Raymond Cocks was right that Maine's 'failure to provide a convincing synthesis of law, history, and philosophy' encouraged a more restricted understanding of the appropriate parameters of legal study, and limited the scope of claims that the legal past contained lessons

[205] Maitland, above n 59, p 16; for a more recent example, Dworkin, above n 71; Samuel, above n 35, p 98. The system of registration introduced by the Law of Property Act 1925 can only have helped sever the tie between lawyers and history, at least in regards to land law.
[206] Parker, above n 181, p 42; and in general Collini, Winch and Burrow, above n 48; Paul Vinogradoff, 'Aims and Methods in Jurisprudence in *Collected Papers*, above n 163, vol 2, p 324.
[207] H Maine, *Popular Government* (3rd edition (London: John Murray, 1886).
[208]As Vinogradoff himself noted: R Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 24(8) Harvard Law Review 591, 601; P Vinogradoff, 'Review of Interpretations of Legal History by R Pound' (1923) 38 The English Historical Review 298.
[209] See Schauer, above n 39; D Priel, 'Toward Classical Legal Positivism' (2015) 101(4) Virginia Law Review 987; Letter from Paul Vinogradoff to Melville Madison Bigelow (2 July 1904), (Bigelow Collection, Howard Gotlieb Archival Research Center, Boston University, Bigelow Collection, Box 2, Vinogradoff Folder).
[210] Gordon, 'Historicism', above n 6, p 1022.

which could be made use of for the future.[211] Vinogradoff's efforts to prevent this were unsuccessful. Vinogradoff was aware of Pound,[212] and worked with Ehrlich,[213] both in the next generation of scholars, and both needing more 'genuine investigation of historical development'. They had at least made good efforts to avoid the temptation of the 'barren symbolism of legal mathematicians'.[214]

Some challenges faced by historical jurisprudence in Vinogradoff's time remain, including the association with discredited or outmoded nineteenth century ideas about legal evolution, even though Vinogradoff's version of historical jurisprudence was not committed to any 'fated scheme of successive stages'.[215] However, the shortcomings which inevitably attach to any method for thinking about law do not discount the usefulness of that method in aiding our understanding. Historical jurisprudence can offer a way to use historical ideas of law to provide some insight into the nature of law, and even evidence as to which reforms are likely to succeed or fail, without necessarily being deterministic as to the future of a legal system.[216] Even if Vinogradoff's ideas remained incomplete as to change over time and contained some overenthusiastic inferences, it does not follow that his method cannot be usefully deployed in our thinking about law. And it is clear that historical ideas are used in exactly this way in modern jurisprudence, and in legal practice.[217] But this is often done incidentally, unconsciously, and without much deference to the tradition of the method.

[211] Cocks, *Maine*, above n 14, p 146.
[212] See n 208 above.
[213] The similarities with Ehrlich are not coincidental - they even worked together on an edited volume at one point: P Vinogradoff and L Ehrlich, *Year Books of Edward II: 6 Edward II, A.D. 1312-1313,* Publications of the Selden Society, vol. 34 (London: Quaritch, 1918).
[214] Paul Vinogradoff, 'The Crisis of Modern Jurisprudence' in *Colleced Papers*, above n 163, vol 2, p 216; p 224.
[215] Vinogradoff, *Outlines*, above n 30, p 148.
[216] As in Critical Legal History: Gordon, 'Critical Historicism', above n 6.
[217] A small sample of examples might include S Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rules in Contract' (1992) 12 OJLS 170; C MacMillan, ''Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law' (2005) 63 CLJ 711; S Bright, 'The uncertainty of certainty in leases' (2012) 128 LQR 337, all of which are useful in teaching core undergraduate law subjects.

Does a re-evaluation of Vinogradoff's legal theory bring to light new or forgotten ideas about the nature of law, or the methodology to be pursued in investigating it? The calls for a framework wherein comparative legal history and/or legal theory may interact profitably with legal history suggest that if these ideas are not new, then they are at least largely forgotten. Then again, perhaps not, in light of the rediscoveries made by Tamanaha and the Critical Legal History school. However, the rehabilitation of Vinogradoff remains justified. The preceding paragraphs demonstrate that historical jurisprudence can and has been used by modern authors in a variety of ways: it was a key progenitor of embedded assumptions about the relationship between law and society; it provides a way to evaluate analytical models; and it proposes difficult and unsolved problems about legal change which we must not ignore. Given this, it should not be a silent partner in our legal theoretical discourse. Whilst Vinogradoff's historical jurisprudence was of its time, and many of its insights have now been either further developed or re-discovered independently by researchers in other schools, it is to overlook a significant contribution to our collective notions of law to fail to explicitly recognise this. This is especially so in light of the renewed interest in the use of history and legal theory together discussed here. It is time to bring Vinogradoff out of the footnotes and engage with historical jurisprudence as the rich and provocative legal theory he intended it to be.